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# UB Law And The Bill Of Rights

## *A Reflection in Memory of Jay Wishingrad '75*

By Thomas E. Schofield '75

In the early 1970s the University at Buffalo School of Law expanded as did law schools across the country. But at UB a distinct intellectual milieu emerged, perhaps by accident, and only for a brief moment.

Mitchell Franklin, as emeritus professor, was the nation's foremost scholar of the intellectual origins of the Bill of Rights. He traced the Constitutional sources from 17th and 18th century European radical movements. The Bill of Rights and modern political movements were reconnected through painstaking historical scholarship.

Professor Robert Gordon, now at Stanford, expanded the historical approach in British and American legal history. New junior faculty arrived. John Schlegel revived interest in American Legal Realism, inadvertently nurturing a new realism within Critical Legal Studies.

Stewart Macauley's Law and Society contracts skipped rules for historic pattern: contract doctrine linked to emergent 19th century capitalism; death of contract by strict liability and administrative law. Continuing relations replaced black letter as a useful beginning point for analysis. Franklin and Macauley's first principles of evidence gathering, skepticism and big picture objectives shaped their students. We remain mystified by hornbook law.

Along with Bob Gordon and Janet Lindgren, Macauley instilled the Wisconsin legal history tradition, a



*Jay Wishingrad*

social history pioneered by Wisconsin's Willard Hurst. Sometimes, historical ferment at UB was fragile: faculty not fully sharing a common enterprise, yet contributing to a coherent whole.

Students who skipped a few "bar courses" found a "legal foundations" curriculum that deans and faculty could only wish to have planned... both activist and in the Jeffersonian model of legal education as fundamental liberal education. *Buffalo Law Review* welcomed Franklin's constitutional essays and student comment in

the same vein as UB attracted recognition among law schools.

At the student core of this education was Jay Wishingrad, Class of 1975. Wishingrad came from New York University, graduated UB Law with honors, clerked in the Appellate Division and began practice in New York with Kay, Scholer, Fierman, Hays and Handler. He became a partner at a prominent civil liberties firm and later specialized in intellectual property litigation for creative artists and producers.

But Wishingrad also maintained

ties to legal education as commenced at Buffalo. He continued to write in law reviews, the *ABA Journal* and the *New York Law Journal* while practicing and teaching at Cardozo Law School. Few faculty or students from the UB "activist enlightenment era"

failed to analogize from entrenched Constitutional rights.

The approach by analogy relies upon two or more Constitutional amendments to address a challenge to liberty by argument stronger than the sum of its parts: what Justice Thur-

Tenth Amendment allocated undelegated powers to the states *or* the people. Hence, Wishingrad: "the Bill of Rights was intended to be a barrier — not a rickety picket fence — protecting the people from *their* government."

Wishingrad exposed fuzzy legal concepts, inadequate expression, inadequate historical understanding as contributors to an attack upon fundamental liberties. Constitutional danger lurks in superficial reasoning and a-historical fact gathering. Wishingrad's defense of rights is simply stated: better legal work undermines a deficient legal order from within. The educated imagination contributes to the defense of civil liberties through an expanded text defining basic civil rights.

Jay Wishingrad was a champion of the cause of liberty preserved through law. It was and is a worthy cause, fragile and in need of protection. On October 30, 1991, Wishingrad lost a fight with leukemia. A powerful voice in defense of the Bill of Rights is silenced. This Law School community nurtured a distinct Bill of Rights heritage well expressed in a distinguished young career cut tragically short.

It is a time to pause and remember; then time to carry on. The path is marked. ■

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## *Good writing begets good writing. Legal writing should not be a mystery story.*

remain as tenacious in adherence to the underlying legal tenants and few have pushed our constitutional boundaries as far as Wishingrad.

Wishingrad's themes were simple, elegant and important — starting with a call for clarity of expression and for ordinary English as the language for legal writing. Poor legal writing requires more attention to what we read. Good reading begets good writing. Legal writing should not be a mystery story.

Wishingrad's second theme explored method and legal reasoning beyond the interminable logic chopping of current judicial opinions. We need the gap filling power of analogy, particularly in the delineation of rights. Many Wishingrad essays critique Supreme Court cases where Justices

good Marshall described as a "unitary argument". The death penalty, sexual privacy, unreasonable punitive damages were treated to Wishingrad's commentary from this framework.

Interwoven with the call for lucidity and reason, Wishingrad argued for interpretation of the Bill of Rights as a whole. Understanding of the Bill of Rights requires a unified text. The people demanded limits as a condition for the sweeping governmental powers permitted by the new Constitution. The restraints were not to be limited by strict interpretation and circumscribed original intent.

Failure to embrace the Constitution as a whole defies the Ninth Amendment caveat that the people retain rights not enumerated which shall not be disparaged or denied. The